IN THE

United States

OCTOBER TERM, 1940

No. [redacted] [redacted] 127

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody & Co., Inc., Bankrupt,

Petitioner,

vs.

H. I. BYRAM, TAX COLLECTOR FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Deputy County Counsel,
Of Counsel.

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IN THE

Supreme Court

OF THE

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No. 837

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the respondent, H. L. Byram, Tax Collector of the County of Los Angeles, and files this brief in opposition to the Petition for Writ of Cer-

tiorari to the United States Court of Appeals for the Ninth Circuit, on the ground that there are no special or important reasons for the exercise of the discretion of this Honorable Court in granting a review on writ of certiorari and on the ground that the decision of the Court of Appeals is correct.

This case involves a tax claim which the referee in bankruptcy reduced proportionately when a *part* of the merchandise assessed as one lot was abandoned. Both the District Judge and the Court of Appeals for the Ninth Circuit held that the referee had no power to do so under the circumstances.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 172 F. 2d 868 and is also included in the transcript at page 60. The opinion of the District Court was not printed in the reports but is included in the transcript at page 49.

JURISDICTION

Respondents do not claim any defect in the statement of jurisdiction contained in the petition.

QUESTIONS PRESENTED

1. May a tax claim be reduced under the first proviso of section 64a(4) of the Bankruptcy Act (11 U. S. C. A. Sec. 104a(4) when the *tax* does not exceed the *value* of the bankrupt's interest in the property?

2. Does abandonment relate back so as to avoid a personal liability for taxes accrued while conducting the business by order of court?

3. Does the bankruptcy court have power to redetermine an assessment, or to arbitrarily divide it, after its quasi-judicial determination pursuant to California law?

STATEMENT

The first Monday in March is the tax date in California (Calif. Constitution, Article XIII, Sec. 8, Calif. Revenue and Taxation Code, Sec. 405.) On said day the Debtor, now the Bankrupt, was in possession, operating its business under Court order (Tr., 1, p. 14). Pursuant to the declaration filed on the debtor's behalf by its chief accountant (Tr., p. 32), all of the merchandise on the premises of which the Debtor was the beneficial owner was assesssed as one item at a valuation of $126,950, including both pledged and unpledged merchandise (Tr., p. 31). A small part of the pledged merchandise was actually withdrawn and sold by the Debtor before liquidation commenced. (T., p. 31). The portion of the pledged merchandise which was still in the warehouse was ordered abandoned to

the pledgee on August 20, 1947, (Tr., pp. 27-28), or five months after the tax had become due and the personal obligation therefor fixed. (Rev. & Tax Code, secs. 2901,[1] 3003[2]).

SUMMARY OF THE ARGUMENT

No special or important reasons are alleged for granting the Writ and none exist. The case is not of far reaching importance because in the normal situation pledged property would be separately assessed. Here the pledged property was only *part* of the property assessed and the first proviso of sec. 64a(4) of the Bankruptcy Act (11 U. S. C. A. sec. 104a(4) by its terms is not applicable where the *tax* does not exceed the *value* of bankrupt's interest in the *property*. There is no material conflict between the cases cited by appellant and the decision of the Court of Appeal in this case. The alternative ground for the decision of the Court of Appeal, that the proportionate reduction in the tax claim when part of the property was abandoned, was in effect a redetermination of the assessed valuation, or an arbitrary division of the assessed valuation, after its quasi-judicial determination pursuant to state law, correctly construes and applies the case of *Arkansas Corporation Commission v. Thompson*, (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.

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[1]*Sec. 2901. Date on which taxes due.* Taxes on unsecured property are due on the lien date.

[2]*Sec. 3003. Suit for collection where lien insufficient security.* Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs.

The decision of the Court of Appeals is correct. The first proviso of sec. 64a(4) does not authorize a proportionate reduction in the tax where *part* of the property is lost or abandoned. A trustee or debtor in possession must pay current taxes as they accrue; nothing in the act relieves him from a personal obligation for such taxes; abandonment five months later does not have such an effect. The bankruptcy court is without power to redetermine, or to arbitrarily divide, an assessment after its quasi-judicial determination has become final according to California law, under the rule of *Arkansas Corporation Commission v. Thompson,* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.

ARGUMENT

I.

NO SPECIAL OR IMPORTANT REASON IS ALLEGED FOR GRANTING THE WRIT

Petitioner alleges (Pet. for Writ, pp. 10-12) the following reasons for granting the writ: That the question is important because the decision emasculates the first proviso of section 64a(1). [He intends to refer to section 64a(4) of the Bankruptcy Act, 11 U. S. C. A. sec. 104a(4).]; the decision enlarges the list of administrative expenses; and it renders abandonment nugatory. That the decision is in conflict with the first proviso of sec. 64a(4) of the Bankruptcy Act, with two cited cases from other circuits, and with one decision of this honorable court and with one from the

California District Court of Appeal. And that the Court of Appeals misinterpreted the case of *Arkansas Corporation Commission v. Thompson,* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. Respondent maintains that there are no special or important reasons for granting the writ and that no adequate reason is alleged.

A. The decision does not emasculate sec. 64a(4) because a tax claim may not be reduced under Section 64a(4) Bankruptcy Act, unless the tax exceeds the value of the bankrupt's interest in the property. There is no authority for dividing the assessment where part of the property is lost or abandoned.

Section 64a(4) of the Bankruptcy Act (60 Stats. 330, 11 U. S. C. A. sec. 104a(4), insofar as material here, reads as follows:

> "SEC. 64. DEBTS WHICH HAVE PRIORITY—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; *Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein* as determined by the court; *provided further,* That in case any question arises as to the *amount or*

legality of any taxes, such question shall be heard and determined by the court; . . . " (Emphasis added.)

This honorable Court has applied the provisos of sec. 64a(4) to tax claims which are entitled to first priority as expenses of administration under sec. 62(a) and sec. 64a(1) (11 U. S. C. A. secs. 102a and 104a(1)). (See: *Arkansas Corporation Commission v. Thompson* (1940), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.)

In applying the first proviso of sec. 64a(4), quoted above, the Court of Appeals for the Fifth Circuit said in *Glass v. Phillips* (1943), 139 F. 2nd 1016, at 1017:

"The referee and the court below misconceived the language and purpose of Sec. 64, sub. a. The language, 'Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court,' does not provide that no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the tax yielded by an assessment of the value of the interest of the bankrupt estate, but only that the court shall not make an order for the payment of taxes in excess of the value of the interest of any property of the bankrupt estate. If the bankrupt has an interest in property but is not the owner of the whole of such property, no order shall be made to pay the entire tax against the property in excess of the value of the interest of the bank-

rupt in such property. The language of the statute is not susceptible of any other interpretation."

In that case only 20% of a stock of merchandise on which an assessment had been made came into the hands of the trustee, but the value of the 20% exceeded the amount of the tax. It was therefore held that the bankrupt estate must pay the entire tax, not merely its proportionate part thereof.

See, to the same effect: *In re Ingersoll Co.* (1945) (C. C. A. 10th), 148 F. 2d 282, at 284, where part of the land included in an assessment was sold before the intervention of bankruptcy and did not come into the custody of the trustee.

Petitioner has conceded that these two cases from the Fifth and Tenth Circuits are in point and squarely opposed to his argument. (Pet. for Writ, p. 31; Appellant's Opening Brief in the Court of Appeals, pp. 23-24.)

In the case at bar, that portion of the merchandise assessed as one lot which did come into the possession of the trustee was sold for an amount greater than the amount of the total claim filed by the tax collector, respondent herein. (Finding 5 of the referee, Tr., p. 32.) The tax claim was therefore property allowed in full by the Bankruptcy Court.

The court here held merely that the first proviso of sec. 64a(4) does not apply unless the *tax* exceeds the *value* of the property. Petitioner's statement

(Petition for Writ, pp. 33-34) that the holding here requires *all* taxes against *all* property to be paid if *some* property of value comes into the estate is completely erroneous. *Property* in the decision and in sec. 64a(4) clearly means the *property assessed* in one assessment, not any other property. It is submitted that the decision here does not in any way emasculate the first proviso of sec. 64a(4) of the Bankruptcy Act, but applies it literally and correctly.

B. The decision does not enlarge the list of administrative expenses.

Petitioner does not state how this decision could possibly enlarge the list of administrative expenses. If he intends to challenge the settled rule that taxes accruing after bankruptcy are an expense of administration his Statement of Points (Tr., pp. 53-55) and Specifications of Error (Petition, pp. 24-25) are not broad enough to allow him to add this issue.

C. The decision does not render abandonment nugatory.

Abandonment under this decision is still fully effective where the entire property assessed as one item in one assessment is abandoned before any personal liability for the tax accrues.

D. The decision of the Court of Appeal is not in conflict with other decisions.

Petitioner argues that this decision is in conflict with sec. 64a(4) of the Bankruptcy Act (which we

have answered under Point A, *supra*), and with the following cases: *Northumberland County v. Philadelphia and R. C. and I. Co.,* (C. C. A., 3d; 1942) 131 F. 2d. 562; *Hennepin County v. Savage,* (C. C. A. 8th; 1936) 83 F 2d. 453; *Erie Railroad Co. v. Tompkins,* (1938), 304 U. S. 64, 585 Ct. 817, 82 L. Ed. 1188; and *Helvey v. U. S. Building & L. Co.,* (1947) 81 Cal. App. 2d. 647, 184 P. 2d. 919.

The *Northumberland case* is not in conflict; it discusses the distinction between "seated" land, as to which there is personal liability for the tax, and "unseated" land, as to which the owner is not personally liable for the tax. As to the former it holds (131 F. 2d. at 568) that a debtor in possession is personally liable for the tax. Here the tax is an unsecured personal property tax (Tr., p. 26) for which the assessee is personally liable under California law.

Calif. Revenue and Taxation Code, Sec. 3003[3]

See cases under prior but similar statutes:

San Gabriel etc. Co. v. Witmer Bros. Co. (1892), 96 Cal. 623 at 636, 29 Pac. 500, 502, 31 Pac. 588;

City of Los Angeles v. Glassell (1906), 4 Cal. App. 43, 87 Pac. 241;

Miller & Lux v. Sparkman (1932), 128 Cal. App. 449, at 453-454, 17 P. (2) 772.

[3]Sec. 3003. *Suit for collection where lien insufficient security.* Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs.

In the *Hennepin County case (supra),* the Court of Appeals for the 8th Circuit ordered all taxes paid as expenses of operation which accrued during the receivership whether secured by liens or personal obligations. In so far as it holds that sec. 64a(4) of the Bankruptcy Act (11 U. C. S. A. Sec. 104a(4)) does not apply to current taxes which are an expense of administration, it must be deemed to be overruled by *Arkansas Corporation Commission v. Thompson,* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.

The *Erie Railroad case (supra),* holding that there is no Federal common law, has no application to a case like this which involves only the interpretation of a Federal statute.

The *Helvey case (supra),* holds that an abandonment by a receiver or trustee in bankruptcy title reverts to the bankrupt. That question is not involved here.

It is therefore apparent that there is no material conflict between the cases cited by petitioner and the decision of the Court of Appeals in this case.

E. The Court of Appeals followed and correctly applied the rule of Arkansas Corporation Commission v. Thompson, 313 U. S. 132.

The assessment in question here was of one item of merchandise, value $126,950. To apply petitioner's theory, the referee had to determine the assessed valuation of the portion of the merchandise which came into

the estate and the assessed valuation of the portion which was abandoned. He then divided the tax according to this ratio. The Court of Appeals found (Tr., p. 63) that this was in effect a redetermination of the assessed valuation, or at least an arbitrary division of it, after it had been quasi-judicially determined pursuant to state law.

Dividing an assessment is not determining the amount or legality of a tax. It is redetermining the assessed valuation and proportioning the tax accordingly. This the bankruptcy court has no power to do.

Arkansas Corporation Commission v. Thompson (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244;

Baumann v. Sheehan (1944) (C. A. 8th), 140 F. 2d 747, 751;

Commonwealth of Pennsylvania v. Aylward (1946) (C. C. A. 8th), 154 F. 2d 714, 717;

In re Ingersoll Co. (1945) (C. A. 10th) 148 F. 2d 282, 284;

Quinn v. Aero Services, Inc. (1949) (C. A. 9th) 172 F. 2d 157, (Petition for Writ of Certiorari pending *sub nom. Aero Services, Inc. v. Quinn,* October Term, 1949, No. 84).

In Gardner v. New Jersey (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504, the Supreme Court reaffirmed its holding in the Arkansas case (329 U. S. at p. 578) and listed a number of things that the court was authorized to do regarding tax claims. (329 U. S.

at pp. 579-582.) The power to redetermine or to divide an assessed valuation is not one of them.

The California procedure complies with the requirements of the Arkansas case.

Quinn v. Aero Services, Inc., supra.

See:

Hagar v. Reclamation Dist. No. 108 (1884), 111 U. S. 701, 710, 4 S. Ct. 663, 28 L. Ed. 569;

Siebe v. Superior Ct. (1896), 114 Cal. 551, 552, 46 Pac. 456;

People v. Goldtree (1872), 44 Cal. 323;

L. A. etc. Co. v. County of L. A (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277;

Universal Consolidated Oil Co. v. Byram (1944), 25 Cal. (2d) 353, 362, 153 Pac. (2d) 746.

(See sections 405, 441, 454, 616, 617, 1601—1614, 1646[4] Calif. Rev. & Tax. Code.

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[4]*Sec. 405. Time for Assessment.* Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. The assessor shall ascertain such property between the first Mondays in March and July.

Sec. 441. Written property statement under oath: Duty and time to file: Furnishing information or Records for examination. Every person shall file a written property statement, under oath, with the assessor between noon on the first Monday in March and 5 p. m. on the last Monday in June, annually, and within such time as the assessor may appoint. At any time, as required by the assessor for assessment purposes, every person shall furnish information or record for examination.

Sec. 454. Same: Examination in respect of statements: Place for appearance. The assessor may subpoena and examine any person in relation to:

(a) any statement furnished him, or

(b) any statement disclosing property assessable in his county that may be stored with, possessed, or controlled by the person. He may do this in any county where the person may be found, but shall not require the person to appear before him in any other county than that in which the subpoena is served.

Sec. 616. Affidavit of assessor: Effect of failure to make: Affidavit of

The assessed valuation may not be questioned in any state court. The finality of the quasi-judicial determination of the county board of equalization is not affected by the failure of the taxpayer to avail himself of his right to review.

Dawson v. County of Los Angeles (1940), 15 Cal. 2d 77 at 81; 98 Pac. 2d 495;

Luce v. City of San Diego (1926), 198 Cal. 405; 245 Pac. 196;

(*Compare Mahoney v. San Diego* (1926), 198 Cal. 388; 245 Pac. 189, which involved the same assessment and recovery was allowed where appearance had been made before the Board of Equalization);

3 Cooley, Taxation (4th ed., 1924) sec. 1143, p. 2296.

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deputy. On or before the first Monday in July, annually, the assessor shall complete the local roll.

Sec. 617. Disposition of roll on completion. As soon as the assessor completes the local roll, he shall deliver it to the clerk of the board of supervisors, who is ex officio clerk of the county board.

Sec. 1601. Notice of equalization meeting: Manner of giving notice. Immediately on receipt of the local roll from the assessor, the clerk shall give notice of the completion of the local roll and of the time the county board will meet to equalize assessments by publication in a newspaper, if any is printed in the county, or, if none, as directed by the board of supervisors.

Sec. 1602. Period in which roll may be inspected. Until the equalization is finished, the local roll shall remain in the clerk's office for the inspection of all persons interested.

Sec. 1603. Commencement and duration of session. Annually, on the first Monday in July, the board of supervisors shall meet as the county board of equalization to equalize the assessment of property on the local roll. It shall continue in session for that purpose, from time to time, until the business of equalization is disposed of, but not later than the third Monday in July.

Sec. 1604. Sessions for Equalization of assessments made after regular assessment period. At any regular meeting, the board of supervisors, on the request of the assessor or any taxpayer, shall sit as the county board to equalize any assessments made by the assessor outside the regular assessment period for such assessments and during the calendar month preceding the month in which such meeting is held.

Sec. 1605. Authority of board: Generally. After giving notice as prescribed

The situation is comparable to a judgment by default which is a proper basis for a plea of *res judicata* and estoppel.

In re Guardianship of Jacobson (1947), 30 Cal. 2d 326, 334, 182 P. 2d 545;

Fitzgerald v. Herzer (1947), 78 Cal. App. 2d 127, 131-132, 177 P. 2d 364;

Restatement, Judgments, sec. 68, pp. 294, 302; Note 128 A. L. R. 472, 474.

Nothing in California law permits a taxpayer to divide a personal property assessment between various items included in a single assessment. There is however specific statutory authority under certain circumstances for the division of an assessment on real property. (Secs. 2803-2808, Rev. & Tax. Code) The mode is prescribed, requiring full payment of the tax on personal property and possessory interests, the fil-

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by its rules, the county board may increase or lower any assessment on the local roll in order to equalize the assessment of property on the local roll.

Sec. 1606. Same: Limitation. The county board shall neither raise nor lower the entire local roll.

Sec. 1607. Reduction of assessment: Necessity for application: Showing required. A reduction in an assessment on the local roll shall not be made unless the party affected or his agent makes and files with the county board a verified, written application for it, showing the facts claimed to require the reduction.

Sec. 1608. Hearing on application: Examination of applicant. Before the county board makes any reduction, it shall examine, on oath, the person affected or the agent making the application, touching the value of the property. A reduction shall not be made unless the person or agent attends and answers all questions pertinent to the inquiry.

Sec. 1609. Same: Summoning of witnesses: Evidence. On the hearing of the application, the county board may subpoena witnesses and take evidence in relation to the inquiry.

Sec. 1610. Presence of assessor and deputies during session. During the session of the county board, the assessor and any deputy whose testimony is needed shall be present and may make any statement or produce evidence on matters before the county board.

Sec. 1611. Directions by county board to assessor: Time to give: Contents. After five days succeeding the time when notice of the date when the matter

ing of an affidavit with the officer having custody of the tax roll and the payment of a fee. The fact that there is specific authority regarding only real property negatives the existence of any such authority as to personal property.

Nothing in California law permits a taxpayer to pay part of a personal property tax without paying the entire tax. Again there is specific authority regarding real property only. (Secs. 2800-2802, Rev. & Tax. Code.)

Thus if a bankruptcy court or its referee has power to divide an assessment or to pay part of a tax on personal property, some authority therefor must be found in the Bankruptcy Act. It is respectfully submitted that there is no such authority. The only possi-

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will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the asssor to:

(a) Assess any taxable property other than State assessed property that has escaped assessment.

(b) Change the amount, number, quantity, or description of property on the local roll.

(c) Make and enter new assessments, at the same time canceling previous entries, when any assessment made by him is deemed by the county board so incomplete as to render doubtful the collection of the tax.

Sec. 1612. Record of orders and changes made by board. The clerk of the county board shall record in a book kept for that purpose, all changes and orders made by the county board and, during its session or as soon as possible after its adjournment, shall enter on the local roll all changes made by the county board.

Sec. 6114. Delivery of corrected roll: Affidavit of clerk. On the third day after adjournment of the county board, the clerk shall deliver the corrected local roll to the auditor with an affixed affidavit, subscribed by him, as follows:

"I, ————, swear that, as clerk of the board of equalization of———— county, I have kept correct minutes of all the acts of the board touching alterations in the assessment roll, that all alterations agreed to or directed to be made have been made in the roll, and that no alterations have been made except those authorized."

Sec. 1646. Addition of valuations: Entry on roll. As soon as the auditor receives the local roll from the clerk of the county board, he shall add up the valuations on it and enter on the roll the total valuation of each kind of property and the total valuation of all property.

ble applicable provisions are the two provisos of sec. 64a(4). (11 U. S. C. A. sec. 104a(4).) It is submitted that neither proviso grants such authority.

II.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CORRECT

There are three alternative grounds for the decision of the Court of Appeals. a. The first proviso of sec. 64a(4) does not authorize dividing an assessment where *part* of the property is lost or abandoned and the value of the part remaining exceeds the amount of the tax. b. Abandonment does not relate back so as to avoid a personal liability for taxes accrued while conducting the business by order of court. c. Under the decision of *Arkansas Corporation Commission v. Thompson,* 313 U. S. 132, the Bankruptcy Court is without power to redetermine an assessment, or to arbitrarily divide it, after its quasi-judicial determination pursuant to California law.

A. The first proviso of Sec. 64a(4) of the Bankruptcy Act does not authorize dividing an assessment where part of the property is lost or abandoned and the value of the part that remains exceeds the amount of the tax.

The argument on this point and the authorities in support thereof are set out under Point I A, *supra.*

B. Abandonment does not relate back so as to avoid a personal liability for taxes accrued while conducting the business by order of court.

Property taxes in California accrue on the first Monday in March. (Secs. 1 and 8, Art. XIII, Cal. Const., sec. 405 Cal. Rev. & Tax. Code.) Unsecured personal property taxes are due and payable on the lien date, that is, on the first Monday in March (Sec. 2901 Rev. & Tax. Code.) At that time the debtor (now the bankrupt herein) was in possession carrying on its business by order of court. (Tr., p. 14.) Personal property may be assessed to the owner or person in possession on tax day. (*RCA Photophone, Inc. v. Huffman* (1935), 5 C. A. (2d) 401, 42 Pac. (2d) 1059; *County of San Diego v. Davis* (1934), 1 Cal. (2d) 145, 33 Pac. (2d) 827.) It was thus properly assessed to the debtor.

This being an unsecured personal property assessment, under California law the assessee is personally liable for the tax. (See Calif. Revenue and Taxation Code, sec. 3003, quoted under Point I D, *supra,* and cases cited.)

Taxes accruing during an attempted reorganization must be paid as expenses of administration in subsequent bankruptcy liquidation. *U. S. v. Killoren* (1941) (C. C. A. 8th), 119 F. 2d 364.

The trustee herein on April 4, 1947, filed a verified statement with the tax assessor showing the property owned, possessed or controlled by the debtor on tax

day. Such a statement is required by section 8, Art. XIII California Constitution and section 441 Revenue & Taxation Code. In the statement he listed as one item:

> "Mdse. at 5300 S. San Pedro St. $126950. Cotton-ticking-mattresses-etc." (Finding 4, Tr., p. 32.)

This included both the merchandise in the factory and that subject to warehouse receipts in the Hazlett Warehouse, (located in the same building). The tax assessor followed the taxpayer's statement and made one assessment of merchandise at 5300 S. San Pedro Street at a value of $126,950.

A debtor or trustee in possession must pay current taxes as they accrue.

> *Schwarts v. Hammer,* 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060;
>
> *Boteler v. Ingels,* 308 U. S. 57, 60 S. Ct. 29, 84 L. Ed. 78.

In the case of *In re Humeston* (1936) (C. C. A. 2nd), 83 F. 2d 187, the trustee took possession of real property belonging to the bankrupt, collected the rents but failed to pay the taxes as they fell due. Then he attempted to abandon the property to the mortgagees, and the court said (at p. 189):

> "However, they were entitled to some relief. Such taxes as fell due during the period of the trustee's occupation were part of the expenses of that occupation and should be borne by the estate.

Michigan v. Michigan Trust Co., 286 U. S. 334, 52 S. Ct. 512, 76 L. Ed. 1136; MacGregor v. Johnson-Codwin-Emmerich, Inc., 39 F. (2d) 574, 576 (C. C. A. 2); Central Vermont R. Co. v. Marsch, 59 F. (2d) 59 (C. C. A. 1); Prudential Ins. Co. v. Liberdar Holding Corporation, supra, 74 F. (2d) 50. . . . When on the other hand the mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable between November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and penalties accumulated upon them. It was the trustee's duty to pay them when they fell due, and the estate must suffer from his failure. The first order will therefore be modified to conform to this disposition."

See:

Robinson v. Dickey (1929) (C. C. A. 3rd), 36 F. (2d) 147, cert. denied 281 U. S. 750 (1930).

See also:

Hennepin County v. Savage (1936), (C. C. A. 8th), 83 F. 2d 453, cited by Petitioner.

Here neither the debtor nor the trustee paid the tax, due on the first Monday in March. The order of abandonment was not made until August 20, 1947, (Tr., p. 28) five months later.

It is respectfully submitted that under these circumstances no provision of the Bankruptcy Act relieves the bankrupt estate of an obligation once accrued to pay taxes.

C. The Bankruptcy Court is without power to redetermine an assessment, or to arbitrarily divide it, after its quasi-judicial determination pursuant to California law.

See discussion and authorities cited under Point I, E, *supra.*

CONCLUSION

Respondent respectfully submits that there are no special or important reasons for granting the writ; that no errors have been shown in the decision of the Court of Appeals and that the decision of the Court of Appeals is correct and should be affirmed.

WHEREFORE, respondent respectfully submits that the Petition for Writ of Certiorari should be denied and that the judgment of the Court of Appeals for the 9th Circuit should be affirmed.

Dated: July 18, 1949.

Respectfully submitted,

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